

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-42

In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include
Decatur, Texas, in the Dallas-Fort
Worth, Texas, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1994;

Released: May 16, 1994

Comment Date: July 7, 1994

Reply Comment Date: July 22, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by Word of God Fellowship, Inc. ("WOGFI"), permittee of KMPX-TV (Channel 29, Independent), Decatur, Texas, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Dallas-Fort Worth television market to include the community of Decatur, Texas. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2978 n.150 (1993).¹

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade

B contours of some stations in the area, yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."²

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),³ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In support of its request, WOGFI states that there is "ample commonality between Decatur and the Dallas-Ft. Worth market."⁴ It asserts that Decatur is in the Dallas-Ft. Worth Area of Dominant Influence ("ADI"), as determined by Arbitron. Furthermore, it states that Wise County, in which Decatur is situated, is one of the 33 counties in the ADI, and is also one of the 11 counties in the Metro Survey Area and the U.S. Census Bureau's Metropolitan Statistical Area. Moreover, WOGFI claims that Dallas-Ft. Worth stations have "significantly viewed" status⁵ in Wise County and that there are common cultural, social and economic interests between the residents of these areas. Also, it states that the distance from Decatur to Ft. Worth is 36 miles coordinate-to-coordinate, and 28 miles computed by city limit-to-city limit. The comparable figures for Decatur to Dallas are 52 and 39 miles, respectively. The petitioner further notes that KMPX's tower is located within the Dallas city limits and that the station places a city

¹ The Commission has delegated authority to the staff to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See* Section 0.321 of the Commission's Rules. *See also Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

² *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See also Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

³ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ Petition at 3.

⁵ *See* Section 76.54 of the Commission's Rules.

grade signal contour over both Dallas and Ft. Worth, which, it asserts, surpasses the "Grade B criteria which the Commission considers as determinative."⁶

6. WOGFI contends that it requires the sought relief so that cable systems in the vicinity of Dallas and Ft. Worth "will have an opportunity to carry KMPX without concern for adverse financial implications because of copyright obligations."⁷ It also states that because of non-duplication protection and the Commission's syndicated exclusivity rule, it cannot purchase programs for just Decatur. In this regard, the petitioner states that, because it places more than a Grade B signal over Dallas and Ft. Worth, syndicators will only sell it programs that have not been purchased by Dallas or Ft. Worth stations or, where they will sell WOGFI the programs, will only do so at Dallas-Ft. Worth prices. The petitioner alleges that it cannot both pay Dallas-Ft. Worth prices for programming and afford to indemnify cable systems for the added copyright fees that its carriage as a distant signal would trigger.⁸ Absent the requested relief, WOGFI maintains, it will be unable to compete in the Dallas-Ft. Worth market and will not be a viable television service. This would, it continues, deprive Decatur of its first local television service and a vehicle of local expression.

DISCUSSION

7. Based on the facts presented, we believe that a sufficient, albeit minimal, case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that KMPX provides city-grade signal coverage to Dallas and Ft. Worth such that the station is likely to compete for audience and advertising in the proposed combined market area. Moreover, the petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

8. The Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a proposed market adjustment because each case will be unique to the individual factual situation presented.⁹ The petitioner here has alleged that the proximity of the subject communities and KMPX's signal coverage to Dallas and Ft. Worth demonstrate the appropriateness of

the requested action. However, the distance between Decatur and Dallas or Ft. Worth is not, of itself, determinative of the requisite showing of commonality among these communities. Moreover, the petitioner has submitted no information concerning other television services in the ADI and signal coverage areas that would indicate if, and to what extent, area stations may be competitive.¹⁰ We have previously held that "[m]arket hyphenation helps equalize competition" where, due to population, geographic, or other factors, some stations licensed to different communities beyond the Grade B contours of those stations in a given television market compete for economic support." *TV 14, Inc. (Rome, GA), supra* at 8592. WOGFI has provided no information on any station's Grade B contour other than its own.

9. WOGFI has also shown that it covers Dallas and Ft. Worth with a city-grade signal contour due to the placement of its antenna in Dallas as a result of the Commission's grant of its request for a modification of the KMPX construction permit.¹¹ This modification has enabled KMPX to provide the city-grade service to Dallas and Ft. Worth, which the petitioner now cites in support for uniting Decatur with the Dallas-Ft. Worth market. However, it has not been demonstrated, nor is it apparent, that a Decatur station would place such a signal contour over the Dallas-Ft. Worth market without placing its antenna in Dallas or, conversely, that Decatur receives Grade B coverage from any area station, so as to suggest that, in actuality, the communities are part of a single market.¹² Nor has the petitioner provided any evidence of social, economic or cultural commonality between Decatur and the rest of the Dallas-Ft. Worth market,¹³ or how other media view the market.¹⁴ In other words, while WOGFI can demonstrate a commonality of areas served by Dallas-Ft. Worth stations and KMPX, whose signal contours overlap, it has not demonstrated in its petition that sufficient commonality exists between Decatur and the other communities that comprise the market.

10. To the extent that the petitioner argues that amendment of Section 76.51 will permit cable systems near Dallas and Ft. Worth to carry KMPX without WOGFI having to indemnify such systems for increased copyright liability, it has failed to provide any specific examples of KMPX being denied carriage or the petitioner being asked to indemnify any cable system because the station might be a distant

⁶ Petition at 4.

⁷ Petition at 2.

⁸ Petition at 5.

⁹ See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977. Similarly, while the factors set forth in paragraph 3, *supra*, are among those the Commission will evaluate in proposed hyphenation cases, they are by no means, individually or collectively, determinative in every case.

¹⁰ See, e.g., *Notice of Proposed Rule Making* in MM Docket No. 93-260 (Marion, IN), 8 FCC Rcd 7273 (1993).

¹¹ See *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992). In that decision, the Commission, *inter alia*, allowed the specification of an antenna site in Dallas upon a showing that, utilizing the NBS Tech Note 101 method for determining signal contours, KMPX would provide city-grade service to Decatur. KMPX does not place even a Grade B signal contour over Decatur according to standard Commission prediction curves. See Sections 73.684 and 73.699 of the Commission's Rules.

¹² Indeed, in granting the above-referenced modification of construction permit, the Commission noted that it would result in a Grade B gain area encompassing more than 2.1 million

persons, in areas near Dallas-Ft. Worth. It also, however, found that the modification would result in a loss of KMPX's Grade B service to 150,000 persons, and that a "white area" of 621 persons and a "gray area" of 1,365 persons would thereby be created. *Decatur Telecasting, Inc.*, *supra* at 8623. Although in granting the modification we found such losses to be theoretical because KMPX had not then commenced service, we are nevertheless concerned that KMPX's emphasis of service to Dallas-Ft. Worth, and away from other segments of the market, raises the question of whether "significant viewing" status, rather than market hyphenation, may be more appropriate to reflect the true nature of KMPX's competition when it is not clear that KMPX competes for audiences and revenues in areas beyond Dallas-Ft. Worth.

¹³ See, e.g., *Report and Order* in MM Docket No. 93-291 (Lawrence, MA), 8 FCC Rcd 8171 (1993); *Report and Order* in MM Docket No. 93-303 (Williamsport and Hazleton, PA), DA 93-1449, released December 21, 1993.

¹⁴ See, e.g., *Notice of Proposed Rule Making* in MM Docket 93-291 (Lawrence, Mass.), 8 FCC Rcd 8171, 8172 (1993).

signal¹⁵ or to demonstrate that, without the requested relief, KMPX's viability would be threatened. Moreover, because the station presents "religious/family" programming, the extent of potential copyright liability in this case is not clear.¹⁶ Under Section 111 of the Copyright Act of 1976, title 17 of the U.S. Code, cable carriage of television station that qualifies as a "specialty station" or is considered a "significantly viewed signal" does not incur "distant signal" copyright liability. On the basis of the petitioner's statements, it appears that KMPX might qualify as a "specialty station" or "significant viewed signal" for copyright purposes such that any potential liability might be alleviated.¹⁷ From the information submitted by the petitioner, however, we are unable to assess the impact of any copyright liability on the viability of KMPX.¹⁸

11. Nevertheless, because the facts before us indicate that KMPX and the stations licensed to Dallas-Ft. Worth may, in fact, be competitive, we believe that the initiation of a rule making proceeding is warranted. Proponents of amendments to Section 76.51 of our Rules, however, should be aware that the standard of proof to change the rules is higher than the standard to simply initiate a rule making proceeding. Under these circumstances, then, it may be helpful to receive additional comment on the issues raised above, as well as the general nature of any competition between KMPX and other stations in the subject market for viewers, programming and advertising revenue.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

12. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

13. Pursuant to applicable procedures set forth in §§1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 7, 1994**, and reply comments on or before **July 22, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

14. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

15. For additional information on this proceeding, contact Roger Holberg, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
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¹⁵ See, e.g., *Notice of Proposed Rule Making* in MM Docket No. 93-207 (Riverside, CA), 8 FCC Rcd 4783 (1993).

¹⁶ The petitioner's assertions as to its particularized need for the requested action, i.e., the effect of the copyright compulsory license, is a factor present in virtually all cases of this type. Of itself, however, this factor is not determinative of the appropriateness of a proposed market adjustment. Rather, it is but one of the many types of evidence the Commission may consider in evaluating the competitive nature of a particular television market.

¹⁷ See *Policy Decision Concerning Cable Compulsory License*

Specialty Station and Significantly Viewed Signal Determinations, 54 FR 38461 (1989) (The Copyright Office adopted procedures by which television stations could establish that they qualify as "specialty stations" entitling cable systems to carry their signals at the lower royalty rate for "permitted" signals.).

¹⁸ Similarly, the lack of specific information in the petitioner's submissions does not allow us to assess whether, and to what extent, KMPX actually competes with other stations in the market for the acquisition of programming. See, e.g., *Notice of Proposed Rule Making* in MM Docket No. 93-290 (Newton, NJ/Riverhead, NY), 8 FCC Rcd 8136, 8137, ¶ 7 (1993).